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STATE OF WISCONSIN :: COURT OF APPEALS :: DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2018-AP-2305-CR

vs.

Trial No. 17-CF-227

MISTER N.P. BRATCHETT,

Defendant-Appellant.

Appeal from an amended judgment of conviction entered
August 15, 2017 in the Circuit Court of Milwaukee County,
Honorable Jeffrey A. Conen, Judge, presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF ISSUE

Whether the evidence is insufficient to support the charge of mutilating a corpse because the State failed to proffer evidence that Mr. Bratchett acted with intent to conceal a crime or avoid apprehension, prosecution or conviction for a crime

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication are requested in this appeal.

STATEMENT OF THE CASE

Procedural history

A complaint dated January 11, 2017 charged Mr. Bratchett with arson of property other than a building in violation of Wis. Stat. §943.03. Apx. 101-102; 1: 1-2. An information dated February 2, 2017 charged Mr. Bratchett with two counts: arson of property other than a building in violation of Wis. Stat. §943.03 and mutilating a corpse in violation of Wis. Stat. §940.11(1). Apx. 103; 7: 1.

On April 24-27, 2017 the case was tried to a jury before the Honorable Jeffrey A. Conen. The jury returned a verdict of guilty on each count. 79: 1-2; 121: 5.

On June 29, 2017 Judge Conen imposed a sentence of on the mutilating corpse count of 10 years imprisonment (7.5 years initial confinement and 2.5 years extended supervision), and a concurrent sentence on the arson count of 2 years imprisonment (1 year initial confinement and 1 year extended supervision). 122: 37-38. A judgment of conviction was entered July 3, 2017. 93: 1-3. An amended judgment was entered August 15, 2017 reflecting that restitution was set at $0. Apx. 104-106; 95: 1-3.

The car fire

On Christmas morning of 2016, the fire department responded to a call of a car on fire, possibly with a person inside. 117: 20. Upon arrival at 54th and Capitol Drive, fire department personnel observed a car burning in an alley. 117: 22. The fire department put out the fire using a "wider spray" which was less destructive of possible evidence. 117: 23. A body was found inside the car. 118: 9. Inside the trunk, police found a bag with the name "Aliahna Blunt" on it.

The burned car, a black Honda Civic, belonged to Thomas Luecke. 117: 63; 118: 17. Mr. Luecke's granddaughter Amanda Leininger had leased the car, and when Ms. Leininger could not afford to buy the car at the end of the lease, Mr. Luecke bought it and allowed Ms. Leininger to use it. 117: 63-64. Ms. Leininger was the major driver of the car, but Ms. Leininger's significant other, Brandon Blunt, also drove the car. 117: 65-66. Ms. Leininger and Mr. Blunt have two children, one of whom is Aliahna. 117: 67.

After police interviewed Mr. Leucke, Brandon Blunt became a person of interest. 118: 17. Police knew Mr. Blunt because he was a possible witness in a 2015

homicide, and a sample of Mr. Blunt's DNA was taken in the course of that prior homicide investigation. 118: 18. At the autopsy of the body in the car, A DNA sample was collected. 117: 58. DNA testing revealed that the deceased person in the burned car was Brandon Blunt. 118: 70-76.

Neither the fire nor smoke caused Mr. Blunt's death. Carbon dioxide is not absorbed in a person's blood unless the person inhales it, and Mr. Blunt had no carbon dioxide in his blood. 118: 51-53. Mr. Blunt also had no soot in his trachea or bronchi. 118: 53. However, Mr. Blunt had Oxycodone and Alprazolam in his system each at levels four and one-half times a lethal dose. 118: 53-56. Both of these drugs suppress respiration and cause "heavy lungs;" Mr. Blunt had heavy lungs. 118: 54. These findings lead the medical examiner to conclude that Mr. Blunt was dead *before* the fire, and that the cause of death was acute mixed drug intoxication. 188: 56-57.

A detective from the Fire Investigations Unit examined the burned Honda at the tow lot. 118: 27-29. This detective determined that the origin of the fire was in the passenger compartment, and that the fire was more intense in the front seat. 118: 32-33. The detective collected samples from the Honda to be tested by the crime

lab for accelerants. 118: 36-37. The crime lab found gasoline present in these samples. 118: 40, 86. Based on his observations and the crime lab results, the detective determined that the cause of the fire was arson. 118: 40.

Police responding to the car fire noticed surveillance cameras on nearby properties, and obtained footage from one of these cameras. 117: 36. This video was exhibit 10. 117: 47, 57. This recovered footage had an on-screen clock which was ahead of actual time by about 62 minutes. 117: 49, 57. The video had no sound. 117: 50. The discernable activity was on the far left portion of the screen. 117: 51. Just before 8:12:49 on the (erroneous) on-screen clock, a car had arrived. 117: 54. At 8:15:20 the illumination of brake lights was visible. 117; 53-54. At about 8:23 the movement of a silhouette figure was visible at the rear of the vehicle; while body parts or legs could not be discerned, one could see movement as if someone were walking. 117: 55, 61. Then one can see fire and smoke, and what appears to be somebody walking in a northbound direction. 117: 55.

The theft investigation

Mr. Bratchett came to be connected to the burned car through investigation of a theft which initially seemed

unrelated to the car fire.

On Christmas Eve of 2016, Rashaan Lawson left for work about 1:00 p.m. 118: 91. Mr. Lawson left his 13 year-old daughter with Sara Manning, who is Mr. Lawson's ex-girlfriend and his daughter's mother. 118: 91, 94. Only Mr. Lawson and his daughter had keys to his home. 118: 94. When Mr. Lawson returned from work about 1:00 a.m. on Christmas morning, he found that his home had been cleaned like by a maid service: his bed was made, his dishes were cleaned, and magazines and newspapers were picked up. 118: 94-95. Mr. Lawson believed only Sara Manning could have cleaned his home. 118: 96. Mr. Lawson also found that a .22 caliber Derringer and a pair of shoes were missing from his home, and he accused Ms. Manning of the theft. 118: 97-98.

Ms. Manning admitted that she went to Rashaan Lawson's home on Christmas Eve to surprise him for Christmas by cleaning the house. 119: 11. Ms. Manning testified about events of that day under a cooperation agreement under which she must testify truthfully and in return would not be charged with burglary, theft, theft of firearm or criminal trespass to Mr. Lawson's home. 119: 9-10.

Before going to Mr. Lawson's house, Ms. Manning was with Brandon Blunt, whom she had known for 4 years. 119: 11. They stopped at a studio, with microphones and equipment to record music, where she saw that Mr. Bratchett and another man were present. 119: 19-20. Ms. Manning arrived at the studio about 6:00 p.m. and was there for 20 to 25 minutes while Mr. Blunt rapped into a microphone. 119: 20-22, 27, 30. Ms. Manning and Mr. Blunt then left the studio and ran a number of errands together; at one of their stops at a Speedway gas station, Mr. Blunt apparently sold drugs to some unidentified person. 119: 21-22, 30-31.

Mr. Blunt then drove Ms. Manning to Mr. Lawson's in his black Honda four-door, arriving about 8:00 to 9:00 p.m. They entered the home, and inside Mr. Blunt sold Ms. Manning six 15 mg. Oxycodone pills for $60.00. 119: 11-13. Mr. Blunt then left, and Ms. Manning stayed to clean the house. 119: 13.

While cleaning Mr. Lawson's home, Ms. Manning was replacing the soap dispenser under the sink when her elbow hit a pipe and broke it: 119: 13-14. Unable to fix the pipe, Ms. Manning called Mr. Blunt for help. 119: 14-15. Mr. Blunt came shortly after midnight, and Mr. Bratchett

was with him. 119: 15. Mr. Bratchett was the person who fixed the pipe. 119: 16. Ms. Manning planned to leave with Mr. Blunt and get a ride from him; however, while she went to turn out the lights and put her daughter's key in her room, Mr. Blunt and Mr. Bratchett left without her. 119: 16.

Ms. Manning admitting knowing that Ms. Lawson kept a gun in his bedroom closet, and that she had seen this gun. 119: 17-18. However, she denied stealing the gun. 119: 29. Ms. Manning stated that Mr. Blunt and Mr. Bratchett were in the house but out of her sight when she used the bathroom. 119: 16-17. On cross-examination, she said she also left the two men alone in the house while she went to Walgreens, although she had failed to tell this to the police because she did not want Mr. Lawson to know. 119: 31-32.

Investigation of Mr. Bratchett

Mr. Bratchett became a suspect. 119: 76. On January 5, 2017 police checked Mr. Bratchett's mother's house at 3808 North 55th Street and his sister's house next door at 3800 North 55th Street, and found Mr. Bratchett at his sister's. 119: 77-79. Police engaged Mr. Bratchett in non-custodial interviews both at his sister's and

downtown. 119: 80.

In his interviews, Mr. Bratchett provided his cell phone number and gave an account of events on the previous Christmas Eve. 119: 82. He was at a friend's house, which was also a studio, at 5873 North 38th Street. 119: 82-83. Brandon Blunt stopped over with Sara Manning, and Mr. Blunt started to make a rap song or recording. 119: 83-84. After staying about a half an hour, Mr. Blunt and Ms. Manning left the house/studio. 119: 84.

Later, Mr. Blunt telephoned Mr. Bratchett to request he fix some stuff at a house, and Mr. Bratchett agreed. 119: 84. Mr. Blunt picked up Mr. Bratchett at the house/studio in his black Honda and drove him to a house around 91st and Dean Road. 119: 85. They were met at the back door by a female, who directed Mr. Bratchett to a broken pipe which had been bumped free of its fittings. 119: 85. After Mr. Bratchett repaired the pipe, Mr. Blunt paid him for the work and they returned to the house/studio on 38th Street around midnight; after staying there about a half an hour, Mr. Bratchett returned home to his sister's house. 119: 85-87. After Mr. Blunt dropped Mr. Bratchett off at his 55th Street residence, Mr. Bratchett was not sure where Mr. Blunt intended to go; Mr. Blunt had told Mr. Bratchett that

he was going to "bust a move," which could mean to get drugs, find a girl, or something else. 119: 87. Mr. Bratchett was unsure of exact times, and indicated to police that he could be clearer with times if he had his phone and a recording on the phone of Mr. Blunt rapping. 119: 86.

At the conclusion of Mr. Bratchett's non-custodial police interview downtown, police drove Mr. Bratchett to his home to obtain his phone. 119: 88; 120: 6-8. Police obtained Mr. Bratchett's phone, and Mr. Bratchett consented to police downloading the information it contained. 120: 8-10.

On Mr. Bratchett's phone, police noted a video posted at 2:58 a.m. on Christmas morning depicting Mr. Blunt sitting in a chair, apparently intoxicated, with a small gun on his lap. 120: 12, 16-17. Sara Manning viewed a photo apparently lifted from this video (exhibit 37). 119: 18-19. She indicated the gun Mr. Blunt was holding is Mr. Lawson's gun, and that photo was taken at the studio. 119: 18-19.

Police also noted Mr. Bratchett's phone contained a Google Map account which showed a timeline of places visited. 120: 17-18. This timeline shows where the phone stops, but does not show routes travelled between stops.

120: 24-25. Police focused on Christmas Day of 2016. 120: 19. Police determined the following locations of the phone at the following times:

- at 5873 North 38th Street at 12:18 a.m. 120: 21.

- at 4209 West Silver Spring, a Marathon gas station, from 4:17 to 4:30 a.m. 120: 22-23.

- at Popuch Park from 5:52 to 6:25 a.m. 120: 24.

- at 7965 North 76th Street, a BP gas station, at 6:31 a.m. 120: 25.

- at 54th and Capitol Drive, the scene of the car fire, from 7:10 to 7:18 a.m. 120: 26, 28.

- at 3808 North 55th Street, Mr. Bratchett's mailing address and mother's house, from 7:23 a.m. to 3:23 p.m. 119: 78-79; 120: 27, 29.

Police sought and obtained surveillance video from the BP gas station on 76th Street from Christmas morning. 120: 30-31. This gas station had both interior and exterior security cameras. 120: 34. At about 6:30 a.m. a black 4-door pulls up to pump no. 3. 120: 31. After 30 to 60 seconds, a male gets out of the driver's seat, enters the station and speaks to the attendant, who directs the man to the shelf containing gas cans. 120: 31. The man picks out a gas can and proceeds to the checkout. 120: 31, 36. The

camera image shows a readout of the transaction, which indicates $8.99 for "G-R-O-C" and $5.00 for prepay at No. 3. 120: 34-35. The man then fills the gas can. 120: 37.

The man in the BP video wore a dark colored Adidas sweatshirt, a brown hat, white gloves and dark pants. 120: 39. On Mr. Bratchett's phone, police found a picture of Mr. Bratchett in the same clothing. 120: 39-40.

On the day after interviewing Mr. Bratchett and obtaining his phone, police executed a search warrant at the house/studio at 5873 North 38th Street. 119: 67. In the course of the search, police found cocaine, marijuana, Oxycodone, Alprazolam and other illegal drugs. 119: 69-70. Police found mail addressed to Mr. Bratchett and a prescription made out to Mr. Bratchett for Oxycodone. 119: 68, 71. Two persons found on the premises during the search, Christopher Shoular and Alex Jones, were arrested and charged in connection with the drugs found in the search. 119: 72-73. Mr. Bratchett was not charged in connection with the drugs. 119: 74.

Although his three drug charges were pending and he intended to go to trial, Christopher Shoular testified in Mr. Bratchett's trial under a cooperation agreement in the hope of consideration. 119: 37-40. On Christmas Eve of

2016 Mr. Shoular went to the studio about 5:30 p.m. and found that Alex Jones, Mr. Bratchett and Mr. Blunt were already there. 119: 46. About 7:00 or 7:30 p.m., Mr. Blunt and Mr. Bratchett left together. 119: 49-50. At some point (Mr. Shoular was uncertain of the time), Mr. Bratchett and Mr. Blunt returned to the studio. 119: 51. Mr. Blunt told Mr. Shoular he had items for sale, including a two-shotter pistol and some white Air Jordan shoes; Mr. Shoular was shown the shoes on Christmas Eve, but not the gun. 119: 52-54, 58. However, a day or two after Christmas, Mr. Bratchett showed Mr. Shoular the gun and offered to sell it to him. 119: 59-60. Mr. Shoular identified the gun in the lap of Mr. Blunt in a photograph (exhibit 37) as the same gun Mr. Bratchett offered to sell to him. 119: 58-59.

ARGUMENT

The evidence is insufficient to support the charge of mutilating a corpse because the State failed to proffer evidence that Mr. Bratchett acted with intent to conceal a crime or avoid apprehension, prosecution or conviction for a crime

The standard of review for sufficiency of the evidence is the same, regardless of whether the prosecution's case is based upon direct evidence or circumstantial evidence:

> We hold that the standard for reviewing the sufficiency of the evidence to support a conviction is the same in either a direct or circumstantial evidence case. Under that standard, an appellate court may not reverse a conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 755 (1990); *see also*, *Jackson v. Virginia*, 443 U.S. 337, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). In *Jackson*, the Court adopted a standard of review consistent with *Poellinger*: A defendant is entitled to relief from a

conviction "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." 443 U.S. at 324. The court in *Jackson* found that such a standard is Constitutionally required to guarantee the Due Process right that a conviction be based only upon proof beyond a reasonable doubt. The Court in *Jackson* rejected a lower "no evidence" standard under which a mere modicum of evidence would be sufficient to support a conviction beyond a reasonable doubt. 443 U.S at 320.

In the event a reviewing court finds that evidence to support a charge is insufficient, the prohibition against Double Jeopardy requires that the charge be dismissed with prejudice. *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *State v. Ivy*, 119 Wis.2d 591, 608, 350 N.W.2d 622 (1984).

Mutilating a corpse is an offense defined by statute:

> Whoever mutilates, disfigures or dismembers a corpse, with intent to conceal a crime or avoid apprehension, prosecution or conviction for a crime, is guilty of a Class F felony.

Wis. Stat. §940.11(1). A related offense for hiding a corpse is similar, punishing one who "hides or buries" a corpse. Wis. Stat. §940.11(2); *State v. Badker*, 2001 WI

App 27, ¶24, 240 Wis.2d 460, 623 N.W.2d 142. The intent element for hiding a corpse is broader that for mutilating a corpse, as it includes not only those intents listed for mutilating a corpse, but also the intent to collect benefits under specified governmental assistance programs. Wis. Stat. §940.11(2).

> Mutilating a corpse has two elements:
>
> 1. The defendant (mutilated) (disfigured) (dismembered) a corpse.
> 2. The defendant (mutilated) (disfigured) (dismembered) a corpse with the intent to [conceal a crime] [avoid apprehension, prosecution, or conviction for a crime].
>
> This requires that the defendant acted with the purpose to [conceal a crime] [avoid apprehension, prosecution, or conviction for a crime].

Wis. JI-Crim 1193 (footnote omitted).

In Mr. Bratchett's case proof of this second element is lacking, for while evidence of various crimes is present in the record, evidence is lacking that Mr. Bratchett acted with the purpose to conceal a crime or avoid apprehension, prosecution or conviction for a crime.

Certainly, evidence of crimes (other than those charged against Mr. Bratchett) was abundant in the record. However, burning the car or Mr. Blunt's body neither

concealed these crimes nor reduced the chance of apprehension, prosecution or conviction for these crimes.

Mr. Lawson's gun and shoes were taken, and evidence suggested that Mr. Blunt and Mr. Bratchett possessed the gun at times after the gun disappeared from Mr. Lawson's home. However, even assuming Mr. Bratchett's involvement in stealing the gun and shoes, burning the car containing Mr. Blunt's body does not logically conceal this theft, or reduce the probability that Mr. Bratchett would be apprehended, prosecuted or convicted of the theft.

Likewise, about two weeks after the burning of the car, drugs were found in the house/studio on 38th Street. However, burning of the car and Mr. Blunt's body did not serve to conceal drug possession at the house/studio, or to reduce the odds of Mr. Bratchett (or anyone) being arrested, prosecuted or convicted for possessing these drugs.

Finally, Mr. Blunt's death by drug overdose implicates a possible crime: providing a person drugs which results in that person's death is a form of first degree reckless homicide. Wis. Stat. §940.02(2); *State v. Clemons*, 164 Wis.2d 506, 476 N.W.2d 283 (Ct. App.

1991). Of course, Mr. Bratchett was not charged with causing Blunt's death, as the prosecutor emphasized in his opening statement:

> I want you to keep first and foremost in your minds that the defendant is not charged with causing the death of Brandon Blunt. He's not charged with that crime. Therefore, what that means is that the State doesn't have to prove that the defendant caused the death of Brandon Blunt.

116: 27. And true to his word, the prosecutor did not prove that either Mr. Bratchett or anyone else was responsible for the death of Mr. Blunt. The source of the drugs that killed Mr. Blunt was never established. The State never produced any evidence that Mr. Bratchett or any other particular person was the source of these drugs. The State never produced any evidence that Mr. Bratchett even *knew* the source of these drugs.

Not charging homicide is understandable, as the source of the drugs which caused Mr. Blunt's death is not revealed by the evidence. Mr. Blunt was, according Ms. Manning, a drug dealer: Ms. Manning testified that on the night before he died, Mr. Blunt apparently sold drugs to an unknown person at a Speedway gas station and later sold 6 oxycodone pills to Ms. Manning. The record does not

reveal from where or from whom Mr. Blunt obtained the drugs he sold. Of course, police found drugs at the studio/house on 38th Street; Mr. Blunt was never identified as either a buyer or seller of these drugs. In any event, Christopher Shoular and Alex Jones were charged in connection with these drugs; Mr. Bratchett was not.

Choosing not to charge homicide was reasonable given the lack of evidence. However, charging Mr. Bratchett with mutilating a corpse for the purpose of concealing a crime or avoiding apprehension, prosecution or conviction of a crime was not. The elements of mutilating a corpse do not include any requirement that the person so charged to have caused the death resulting in the corpse. Nonetheless, a review of published appellate cases shows that mutilating or hiding a corpse is almost invariably charged in conjunction with a homicide charge. See, e.g., *State v. Byrge*, 225 Wis.2d 702, 594 N.W.2d 388 (Ct. App. 1999), *aff'd*, 2000 WI 101, 237 Wis.2d 197, 614 N.W.2d 477; *State v. Peterson*, 2001 WI App 220, 247 Wis.2d 871, 634 N.W.2d 893; *State v. Badker*, 2001 WI App 27, 240 Wis.2d 460, 623 N.W.2d 142; *State v. Hoover*, 2003 WI App 117, 265 Wis.2d 607, 666, N.W.2d 74; *State v. Thames*, 2005 WI App 101, 281 Wis.2d 722,

700 N.W.2d 285; *State v. Kutz*, 2003 WI App 205, 267 Wis.2d 531, 671 N.W.2d 660. The only exception appears to be *State v. Pinno*, 2014 WI 74, 356 Wis.2d 106, 850 N.W.2d 207. In *Pinno*, after a man killed his girlfriend, the man and his mother (Ms. Pinno) together disposed of the body; while only the man was charged with homicide, both the man and his mother were charged with mutilating a corpse. *Pinno*, ¶¶25-26, 30. Thus Ms. Pinno, although not involved in the homicide, acted to conceal her son's homicide.

In Mr. Bratchett's case, the prosecutor in closing argument struggled to explain to the jury just what crime Mr. Bratchett supposedly concealed by burning Mr. Blunt's body:

> We know there's drugs involved in this thing, and we know that there's a theft involved in this thing, okay. Rashaan Lawson's .22 caliber two shot Derringer was stolen out of his Ann Street residence and so were some of his shoes. He described them as white Nike Air Jordan shoes. We know that drugs were involved in it because we heard testimony from the medical examiner that Brandon Blunt had about four and a half times a lethal dose of oxycodone in his blood and he had about four and a half times a lethal dose of alprazolam in his blood system as well when the autopsy was performed.

120: 72-73. Thus, the prosecutor simply cited every crime hinted at by the evidence and implicitly suggested the jury should conclude Mr. Bratchett must have acted to conceal these crimes. He further mentions the "recording studio jammed full of those drugs" and the fact that police found an oxycodone proscription in Mr. Bratchett's name dated more than a week after Mr. Blunt's death. 120: 73. After again conceding that he does not know who, if anyone, is responsible for Mr. Blunt's death, and that there is no homicide charge, the prosecutor urged the jury to "connect those dots." 120: 77.

The prosecutor's argument, and the State's underlying theory regarding the intent element of mutilating a corpse, is flawed for at least two reasons.

First, as argued above, assuming Mr. Bratchett committed the act of mutilating Mr. Blunt's corpse, proof was lacking that he did so with intent to conceal any of the crimes suggested by the evidence.

Second, by throwing before the jury evidence of numerous crimes and arguing that Mr. Bratchett acted to conceal one, some or all of these crimes, the prosecutor raises Due Process concerns. How is Mr. Bratchett to defend himself if he is uncertain if the State is claiming

that he acted with intent to conceal the theft Mr. Lawson's gun and shoes, or the presence or possession of drugs at the studio, or a homicide of Mr. Blunt? The problem is analogous to vagueness:

> The axiomatic requirement of due process that a statute may not forbid conduct in terms so vague that people of common intelligence would be relegated to differing guesses about its meaning, carries the practical consequence that a defendant charged under a valid statute will be in a position to understand with some specificity the legal basis of the charge against him. Thus it is an assumption of our system of criminal justice so rooted in the traditions and conscience of our people as to be ranked as fundamental that no person may be punished criminally save upon proof of some specific illegal conduct. Just as the requisite specificity of the charge may not be compromised by the joining of separate offenses, *nothing in our history suggests that the Due Process Clause would permit a State to convict anyone under a charge of "Crime" so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering, for example, would suffice for conviction*.

Schad v. Arizona, 501 U.S.624, 632-633, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991) (plurality opinion) (internal citations, footnote and some quotation marks omitted; emphasis added). While this quote is from a plurality

opinion, a concurring opinion agreed with the premise of the emphasized language:

> [I]t is also true, as the plurality points out, see ante, at 633, that one can conceive of novel "umbrella" crimes (a felony consisting of either robbery or failure to file a tax return) where permitting a 6-to-6 verdict would seem contrary to due process.

501 U.S. at 650 (Justice Scalia, concurring).

Of course, as *Schad* instructs, while a jury must be unanimous as to every element of an offense, a jury need not be unanimous as to means of commission of an offense. In *Schad*, a homicide case, the jury was instructed that it could convict on alternative theories of either premeditated murder or murder in the course of a felony (felony murder). Looking to both history and "the moral and practical equivalence of the different mental states that may satisfy the *mens rea* element," the Court in *Schad* held that the jury need not be unanimous as to whether the defendant committed premeditated murder or felony murder. 501 U.S. at 637, 645. As Justice Scalia explained in concurrence, both premeditated murder and felony murder are encompassed by the ancient common-law crime of murder with malice aforethought. 501 U.S. at

648.

Of course, the jury in *Schad* at least had guidance in the form of instructions explaining the two options of premeditated murder and felony murder. 501 U.S. at 629. Mr. Bratchett's jury, however, was instructed that it may convict if he committed the act of mutilation and had the intent to conceal, or to avoid apprehension, prosecution or conviction of "a crime." 120: 59. The term "crime" was neither defined nor limited. Indeed the standard jury instruction for mutilating a corpse contains no provision for defining or limiting the extent of the term "crime." Wis. JI-Crim 1193. This is understandable given the nearly invariable practice of charging mutilating or hiding a corpse only conjunction with a homicide charge, as in those circumstance it is the homicide which is intended to be concealed.

The circumstances in Mr. Bratchett's case are different, as the prosecutor conceded that there is no homicide charge because he did not know who, if anyone, was responsible for Mr. Blunt's death. Thus, the jury was free to speculate, indeed forced to speculate, as to what conduct might constitute a "crime" intended to be concealed. The problem is not merely that the jury had

alternate possible crimes to consider, as argued by the prosecutor, but that the alternatives were not defined: the jury was never given the elements of, for example, theft, to use in evaluating the prosecutor's argument that Mr. Bratchett acted with intent to conceal a theft.

The acts which might serve as the "crime" that Mr. Bratchett supposedly intended to conceal include theft of a gun, theft of shoes, drug possession, a prescription for Oxycodone in Mr. Bratchett's name, and Mr. Blunt's death by drug overdose. These crimes are disparate and varied, and approach the list of "embezzlement, reckless driving, murder, burglary," et cetera which the Court in *Schad* indicated would violate Due Process if encompassed in a single umbrella crime.

Most disturbing, among the prosecutor's array of possible crimes which he asserted Mr. Bratchett intended to conceal, is the final asserted "crime" suggested to the jury in his rebuttal argument:

> And I think that it's a reasonable and a rationale [sic] conclusion to draw that the reason he did it was because he was trying to disguise the drugs in Brandon's system and try to end up fooling the medical examiner into thinking that Brandon Blunt perhaps was simply burned in the car alive and not had died of a drug overdose.

120: 86-87. What "crime" the prosecutor is asserting that Mr. Bratchett sought to conceal is difficult to discern. Is the crime that Mr. Blunt used drugs, and thus had drugs in his system? Is there a crime of "fooling the medical examiner?" Is the prosecutor suggesting that although there is no homicide charge and the prosecutor conceded not knowing who, if anyone, is responsible for Mr. Blunt's death, the jury should nonetheless hold Mr. Bratchett responsible for that death? The jury had no guidance, and was forced to speculate what was conduct might constitute a crime.

The jury instruction for burglary with intent to commit a felony provides the guidance which the instruction for mutilating a corpse lacks. See Wis JI-Crim 1424. In the fourth element, the jury is told that the State must prove entry "with intent to commit (state felony)." Thus, the State must elect a felony which it asserts the defendant intended to commit. The instruction then requires the court to define the stated felony by reference to the elements in the instruction for that felony.

Despite the discussion of the problems with the lack of guidance to the jury regarding what constitutes a crime,

Mr. Bratchett is not challenging the jury instruction. He recognizes that this Court lacks authority to review a jury instruction in the absence of an objection to the jury instruction at the instruction conference. Wis. Stat. §805.13(3); *State v. Schumacher*, 144 Wis.2d 388, 409, 424 N.W.2d 672 (1988). However, the deficiency in the jury instruction helps explain how the jury could erroneously find that Mr. Bratchett acted to conceal a crime when possible crimes argued by the prosecutor were both numerous and undefined.

An additional explanation for the jury's erroneous decision is that it may have concluded if Mr. Bratchett committed the *ac*t of mutilating a corpse, he must necessarily have acted with the requisite *intent*. However, a jury may not presume such intent merely upon finding sufficient evidence that a defendant committed the requisite act. Thus, in a burglary, "intent to steal may not be inferred from breaking and entering alone." *Gilbertson v. State*, 69 Wis.2d 587, 594-595, 230 N.W.2d 874 (1975) (citing cases). Likewise, it is wrong to infer that if a person mutilates a body, the person must be concealing a crime.

CONCLUSION

Mister N. P. Bratchett prays that this court vacate his conviction and sentence for mutilating a corpse and remand the case and with an order to dismiss that charge.

Respectfully submitted,

_____

John T. Wasielewski
Attorney for
Mister N.P. Bratchett

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 5927 words.

_____

John T. Wasielewski

APPENDIX CERTIFICATION

I hereby certify that I filed with this brief, an appendix that complies with §809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

_____

John T. Wasielewski
Attorney for
Mister N.P. Bratchett

CERTIFICATE OF COMPLIANCE

I hereby certify that I have submitted an electronic copy of this brief, identical to the printed form of the brief, but excluding any appendix, as required by Wis. Stat. §809.19(12).

_____
John T. Wasielewski

APPENDIX CONTENTS